(1)

Supreme Court, U.S.
FILED

No. 93- ___

93-1627 APR 7 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES LINES, INC.,

Petitioner,

—vs.—

PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, ADMINISTRATOR OF THE ESTATE OF ALFREDO VALVERDE, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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46 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court in adjudicating a maritime claim for personal injury and death under the Jones Act must adhere to explicit law established by the Supreme Court of the United States which precludes prejudgment interest?

2. Whether a state court in adjudicating a maritime claim for personal injury and death must adhere to federal maritime law as established in the federal courts of appeals in converting into U.S. Dollars damages for loss of services proven in a foreign currency?

LIST OF PARTIES

The parties, with reference to their status at the trial court, are:

1. Petitioner: United States Lines, Inc.[1], Defendant.

2. Respondent: Public Administrator of the County of New York, Administrator of the Estate of Alfredo Valverde, Deceased, Plaintiff.

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[1] On information and belief, there are no parent companies, subsidiaries or affiliates of Defendant United States Lines, Inc.

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The citation of the order of the Court of Appeals of the State of New York is not available as of the filing of this Petition. (Appendix A, 1a). The decision of the Appellate Division of the Supreme Court of the State of New York is reported at 197 App. Div. 2d 392, 603 N.Y.S.2d 20 (1st Dep't 1993) and is reprinted herein in Appendix B at 4a. The decisions of the trial court, the Supreme Court of the State of New York, County of New York, are unreported. The trial court's decision dated June 20, 1991 is reprinted herein as Appendix E (10a), and its decision dated May 26, 1992 is reprinted herein as Appendix C. (6a).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The two bases for jurisdiction are (1) that a state court of last resort has decided a federal question in a way that conflicts with the decision of a United States court of appeals (Rule 10.1 (b)), and (2) that a state court of last resort has decided a federal question in a way that conflicts with applicable decisions of this Court. (Rule 10.1 (c)).

The order of the Court of Appeals of the State of New York denying Defendant's motion for leave to appeal is dated January 18, 1994, and its date of entry was January 18, 1994. (Appendix A, 1a). The final judgment of the trial court, the Supreme Court of the State of New York, County of New York, to which appeals were taken in the New York State court system, is dated March 2, 1992, and it was entered on May 7, 1992. (Appendix D, 7a). In a Decision and Order dated October 7, 1993, the Appellate Division, First Department, of the Supreme Court of the State of New York remanded the action to the trial court for modification of the judgment consistent with the appellate court's opinion. (Appendix B, 2a). Such a modified judgment has not yet been entered by the trial court.

The statutory provisions which confer on this Court jurisdiction to review the judgment below by writ of certiorari are 28 U.S.C. § 1257 and Rule 10.1 (b) and (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Article III, Section 2.

2. Section 33 of the Merchant Marine Act of June 5, 1920, commonly referred to as the *Jones Act*, 46 U.S.C. § 688:

> RECOVERY FOR INJURY TO OR DEATH OF SEAMAN
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common–law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

This action arose from the personal injury and death on the high seas of Alfredo Valverde, a Brazilian seaman employed by Defendant. On November 30, 1983, he was swept overboard by the sea from the deck of the AMERICAN TRADER. The Complaint, which alleged claims arising under the *Jones*

Act, 46 U.S.C. § 688, and the Maritime Law of the United States, was filed in the Supreme Court of the State of New York, County of New York.

1. Prejudgment interest

The jury awarded Plaintiff the sum of $1.5 Million for conscious pain and suffering and mental anguish, and it ruled that the vessel's negligence was a cause of decedent's pain and suffering. In its special verdict, the jury answered "Yes" to the question "Was the failure of Captain Fiddler [the ship's Master] to engage in a reasonably timely effective and sufficient search for Mr. Valverde a contributing factor to Mr. Valverde's pain and suffering?" (Appendix I, 24a). The jury also found the vessel to be unseaworthy, but it did not apportion the award for pain and suffering between Jones Act negligence and unseaworthiness under general maritime law. (Appendix E, 13a; Appendix I, 23a). The trial court conditionally set aside the award for pain and suffering, pending stipulation by Plaintiff to reduce the amount to $900,000 (Appendix E, 17a-18a), and Plaintiff so stipulated.

On or about July 8, 1991, Plaintiff submitted a memorandum and proposed judgment requesting prejudgment interest. By letter dated July 16, 1991, Defendant objected to the proposed judgment on the grounds, *inter alia*, that prejudgment interest may not be awarded on damages recovered pursuant to the Jones Act. (Appendix L, 28a). In an Order dated July 31, 1991, the trial court initially denied Plaintiff's request for an award of prejudgment interest. However, in the judgment dated March 2, 1992, which was entered on May 7, 1992, the clerk of court added prejudgment interest from the date of the verdict. (Appendix D, 9a)

On or about May 18, 1992, Defendant moved to strike prejudgment interest from the judgment, and that motion was denied by the trial court in a Memorandum Decision dated May 26, 1992. (Appendix C, 6a). Following Defendant's appeal and Plaintiff's cross–appeal, the Appellate Division directed that prejudgment interest be awarded from the date

of decedent's injury and death in its Decision and Order of October 7, 1993. (Appendix B, 5a). On January 18, 1994, the New York Court of Appeals denied Defendant's motion for leave to appeal. (Appendix A, 1a)

2. Damages proven in a foreign currency

Decedent's family lived in Brazil, and all services performed by decedent for his family were performed in Brazil. (Appendix F, 19a). The only evidence of the value of decedent's services to his family is that during the period of 1979 to 1983, his performance of numerous household services "almost halved" his family's monthly rent of 20,000 Brazilian Cruzados. (Appendix F, 19a-20a). Plaintiff failed to offer any proof of the value of the Cruzado in U.S. Dollars at any time, although decedent's wife testified that the Cruzado had been replaced by a different currency at some point, obviously due to its loss of value through inflation. (Appendix F, 19a). Furthermore, the court failed to take judicial notice of any published exchange rate for the Cruzado. Nevertheless, the court awarded Plaintiff $13,200 for past lost services and $29,300 for future lost services,[2] without any conversion of Brazilian currency into U.S. Dollars. (Appendix D, 9a; Appendix K, 27a).

The issue of the amount of lost services was raised by Defendant in its request to charge No. 36: "The amount of lost services should be ascertained by determining the nature, duration, and cost if paid for of the household services which Mr. Valverde would have performed if he had survived the casualty." (Appendix G, 21a). The trial court refused to so charge the jury, and Defendant duly excepted thereto. (Appendix H, 22a). In its post-trial motions, Defendant unsuccessfully

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[2] The judgment awarded net damages, exclusive of interest and costs, of $1,641,500 (Appendix D, 9a), a sum calculated by reducing the jury's damage awards to present value. (Appendix K, 27a). The total of $1,641,500 includes the sum of $29,300 for future lost services (Appendix K, 27a), but the judgment mistakenly shows the amount of the award for future lost services to be $29,500. (Appendix D, 9a).

sought to have the excessive award for lost services overturned on grounds, *inter alia*, that there was no proof of the monetary value in U.S. Dollars of the services performed by decedent. (Appendix J, 26a). On appeal, the award for lost services was affirmed. (Appendix B, 4a).

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORIARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW EXPRESSLY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OF UNITED STATES COURTS OF APPEALS ON IMPORTANT QUESTIONS OF FEDERAL MARITIME LAW.

This Petition presents the important and frequently recurring issue of a state court manifestly disregarding federal maritime law, as spelled out in the decisions of this Court and of the federal appellate courts, in the adjudication of a maritime claim for personal injury and death. In this case, the state court system ignored controlling federal maritime law, as established by decisions of this Court, barring prejudgment interest on damages awarded under the Jones Act, and instead cited the state's public policy and an aberrant ruling of the United States Court of Appeals for the Second Circuit to permit an award of prejudgment interest on damages not apportioned between Jones Act negligence and unseaworthiness. The state court also totally disregarded controlling federal maritime law on the conversion of damages proven in a foreign currency into U.S. Dollars.

A. This Court should grant the Petition to eliminate a conflict between the state court and the decisions of this Court proscribing an award of prejudgment interest in a claim arising under the Jones Act.

As explained above, the jury found that the vessel's negligence contributed to decedent's pain and suffering, but there

was no apportionment of damages between negligence arising under the Jones Act and unseaworthiness arising under general maritime law. Nevertheless, the state court awarded prejudgment interest on the unapportioned damages. This Court needs to make absolutely clear that federal maritime law governs the allowance of prejudgment interest on Jones Act damages and that no prejudgment interest may be awarded on damages arising in whole or in part from Jones Act negligence.

The Jones Act explicitly incorporates rights and remedies under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.* *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 391–392 (1924). *Accord, American Dredging Co. v. Miller*, 114 S.Ct. 981 (1994); *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958). In *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988), this Court ruled that prejudgment interest was not recoverable in a suit brought pursuant to the FELA, notwithstanding a state statute requiring that prejudgment interest be awarded on personal injury recoveries. Noting that Congress never had attempted to amend the FELA to provide for prejudgment interest, this Court concluded: "If prejudgment interest is to be available under the FELA, then Congress must expressly so provide." *Monessen*, 486 U.S. at 339.

Thus, this Court has confirmed that the Jones Act incorporates the FELA and that prejudgment interest is not recoverable under the FELA. However, this Court has not yet reviewed an award of prejudgment interest by a state court in a Jones Act case, and until it does so, there will continue to be uncertainty in some state courts whether such an award of prejudgment interest is allowable.

In addition, there is a conflict among the federal circuits on the question whether prejudgment interest may be awarded on non-apportioned damages arising both under the Jones Act and under general maritime law. In accord with the decisions of this Court cited above, the Fifth and Sixth Circuits have disallowed prejudgment interest in maritime cases where

there has been no apportionment of damages between Jones Act negligence and unseaworthiness. *E.g.*, *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 378 (5th Cir. 1989); *McPhillamy v. Brown & Root, Inc.*, 810 F.2d 529, 531–532 (5th Cir. 1987); *Petersen v. Chesapeake & Ohio Railway Co.*, 784 F.2d 732, 741 (6th Cir. 1986); *Domangue v. Penrod Drilling Co.*, 748 F.2d 999, 1000–1001 (5th Cir. 1984); *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 955–956 (5th Cir. 1984). However, in *Magee v. United States Lines*, 976 F.2d 821, 822 (2d Cir. 1992), the Court of Appeals for the Second Circuit upheld an award of prejudgment interest on such an unapportioned award, on grounds that the "preferable rule, we think, is that the successful plaintiff be paid under the theory of liability that provides the most complete recovery."

In this case, the trial court wrote that "the awarding of interest from the date of verdict apparently is part of the public policy of this State", citing a state court decision under the Jones Act which affirmed an award of interest between the date of the verdict and the date of the judgment. *Haggerty v. Moran Towing & Transportation Co.*, 162 App.Div.2d 189, 556 N.Y.S.2d 314 (1st Dep't 1990). However, the state court ignored the decisions of this Court that are squarely on point, under which the cited public policy of New York State would be preempted by federal maritime law. On appeal, the Appellate Division cited the Second Circuit's ruling in *Magee v. United States Lines, supra*, 976 F.2d 821, when it affirmed the trial court's decision and extended the award of prejudgment interest on unapportioned damages back to the date of the accident. (Appendix B, 5a).

Consequently, this Court should grant the Petition in order to reverse the decision below and thereby eliminate the conflict with decisions of this Court. In doing so, this Court also would eliminate the serious conflict among the federal circuits by overruling the aberrant policy of the Second Circuit permitting an award of prejudgment interest on damages unapportioned between Jones Act negligence and unseaworthiness under general maritime law.

B. This Court should grant the Petition to eliminate a conflict between the state court and a federal court of appeals regarding the conversion into U.S. Dollars of damages proven in a foreign currency in a case governed by federal maritime law.

This Court has held that a plaintiff in a maritime suit for wrongful death may recover "the monetary value of services the decedent provided and would have continued to provide but for his wrongful death." *Sea-Land Services v. Gaudet*, 414 U.S. 573, 585 (1974). Although there was evidence of the value of lost services of the decedent in Brazilian Cruzados, Plaintiff failed to offer any proof of the "monetary value" of the lost services in U.S. Dollars. There is no evidence of the rate of exchange between the Brazilian Cruzado and the U.S. Dollar at any time, and the state court did not take judicial notice of any published rate of exchange between the two currencies. Instead, the court awarded damages for loss of services greatly in excess of the value in U.S. Dollars of the sum in Cruzados found in the evidentiary record.

In *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926), this Court held that damages proven in a foreign currency must be converted into U.S. Dollars at the prevailing rate of exchange. Since *Humphrey* involved a debt arising under foreign law and payable in a foreign country, and which could have been satisfied in foreign currency up to the date of judgment in the American court, this Court held that the currency conversion should be made on the date of the judgment.

The Court of Appeals for the Second Circuit has written that in a claim arising on the high seas under federal maritime law, damages proven in a foreign currency should be converted into U.S. Dollars pursuant to the rate of exchange prevailing on the date of the accident. *Conte v. Flota Mercante Del Estado*, 277 F.2d 664, 670–671 (2d Cir. 1960). *See The Gylfe v. The Trujullo*, 209 F.2d 386, 387 (2d Cir. 1954). Consequently, under the standards set forth in *Conte*, the state

court should have taken judicial notice of the rate of exchange of the Cruzado on the date of the accident in order to calculate the "monetary value" in U.S. Dollars of the damages for lost services as of that date.

Since the state court failed to apply federal maritime law in determining the monetary value in U.S. Dollars of damages proven in a foreign currency, in conflict with a decision of the United States Court of Appeals for the Second Circuit, the Petition should be granted.

CONCLUSION

This Petition presents two discrete and simple questions under federal maritime law that this Court should settle to prevent divergent rulings by the state courts and forum shopping by prospective plaintiffs looking for more favorable standards of maritime law in state courts than prevail in the federal courts. In the interest of maintaining the supremacy and uniformity of federal maritime law, it is respectfully submitted that this Court should grant the Petition.

Dated: April 5, 1994

Respectfully submitted,

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Of Counsel

APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of January 1994.

Present,

HON. JUDITH S. KAYE,
Chief Judge, presiding

Mo. No. 1287

Public Administrator of the County of New York, Administrator of the Estate of Alfredo Valverde, Deceased,

Respondent,

v.

United States Lines, Inc.,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Judge Titone took no part.

/s/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

APPENDIX B

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 7, 1993

Present,

HON. JOHN CARRO, *Justice Presiding*
ERNST H. ROSENBERGER
BETTY WEINBERG ELLERIN
RICHARD W. WALLACH
ISRAEL RUBIN, *Justices.*

M-3568
M-3465

Public Administrator of the County of New York, Administrator of the Estate of Alfredo Valverde, deceased,

Plaintiff-Respondent-Appellant,

—against—

United States Lines, Inc.,

Defendant-Appellant-Respondent.

Defendant having moved for reargument of the decision and order of this Court entered on May 25, 1993 (Appeal No. 49100), or, alternatively, for leave to appeal to the Court of Appeals,

And plaintiff having cross-moved for reargument of the decision and order of this Court,

Now, upon reading and filing the papers with respect to the motion and cross-motion, and due deliberation having been had thereon,

It is order that defendant's motion be and the same hereby is denied in its entirety. Plaintiff's cross-motion insofar as it seeks reargument of said motion is granted and, upon reargument, the decision and order of this Court entered on May 25, 1993 is hereby recalled and vacated and a new order and memorandum substituted therefor.

Enter:

/s/ FRANCIS X. GALDI
Francis X. Galdi
Clerk.

Carro, J.P., Rosenberger, Ellerin, Wallach, Rubin, JJ.
49100—(M-3465, 3568)

Public Administrator of the County of New York,
Administrator of the Estate of Alfredo Valverde, Deceased,

Plaintiff-Respondent-Appellant,

—against—

United States Lines, Inc.,

Defendant-Appellant-Respondent.

Judgment, Supreme Court, New York County (Michael J. Dontzin, J.), entered May 7, 1992 awarding plaintiff $1,900,695.87, including interest from the date of verdict, under the Jones Act and General Maritime Law, unanimously modified, on the law, to the extent that the judgment shall include an award of interest at the stipulated rate of ten percent per annum, compounded annually from the date of decedent's injury and death on November 30, 1983, to the date of entry of a modified judgment, and otherwise affirmed, with costs to plaintiff. The matter is remanded to the Supreme Court, New York County for entry of a judgment as so modified. Defendant's motion for reargument or permission to appeal to the Court of Appeals is denied.

The evidence was sufficient for the jury to find that decedent, whose body was never recovered, had been engulfed by a wave and thrown overboard while still conscious, and remained conscious for three hours before perishing at sea. We find no basis to interfere with the amounts awarded for loss of services and nurture, or the amount to which plaintiff stipulated for pain and suffering (*cf. Willett v Western Oceanic, Inc.*, 117 F.R.D. 379, 383). Unlike the authority relied upon by defendant (*Red Star Towing & Transp. Co. v*

"Ming Giant", 552 F. Supp 367, 377), this case does not involve an award resulting from bias, passion or prejudice aroused by plaintiff's counsel.

The IAS court correctly determined that plaintiff was entitled to prejudgment interest on the entire amount awarded, but interest should have been awarded to plaintiff at the stipulated rate of ten percent from the date of decedent's injury and death on November 30, 1983 (*see, Magee v United States Lines*, 976 F.2d 821; *McCrann v United States Lines*, 803 F.2d 771).

[The decision and order of this Court entered on May 25, 1993 (Appeal No. 49100) is hereby recalled and vacated.)

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: October 7, 1993

/s/ FRANCIS X. GALDI
Francis X. Galdi
Clerk.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 28

Index No.: 17312/85

PUBLIC ADMINISTRATOR, etc.,
Estate of ALFREDO VALVERDE, dec'd,

Plaintiff,

—against—

UNITED STATES LINES, INC.,

Defendant.

DONTZIN, *J.*:

The defendant's application pursuant to CPLR 5019(a) to cure the judgment filed on May 2, 1992, by striking the interest awarded therein from the date of verdict is denied. While I previously denied plaintiff's application for pre-judgment interest in my July 31, 1991 Order, I did not consider the issue of whether CPLR 5002 is applicable. That issue was raised for the first time when a proposed judgment which I signed, was submitted to me on May 2, 1992. While this is clearly a situation which falls within the scope of CPLR 5019(a), I am not persuaded that notwithstanding that we are dealing with a Jones Act and General Maritime Law case, that CPLR 5002 is not controlling. Moreover, the awarding of interest from the date of verdict apparently is part of the public policy of this State. (*See Haggerty v. Moran Towing & Transportation Co.*, 162 A.D.2d 189). This becomes all the more apparent, when you consider that the long (August 8, 1990 to May 7th, 1991) delay in entering the judgment here was occasioned by the extensive post trial litigation brought on by the parties.

Dated: May 26th, 1992

/s/ MICHAEL J. DONTZIN
J.S.C.

APPENDIX D

At an IAS Part 28 of the Supreme Court of the State of New York, County of New York, at the Courthouse, 100 Centre Street, New York, New York, on the 2nd day of March 1992.

P r e s e n t:

HON. MICHAEL J. DONTZIN,

Justice.

Index No. 17312/85

Filed May 7, 1992
County Clerk's Office New York

PUBLIC ADMINISTRATOR, etc. of
ALFREDO VALVERDE, Deceased,

Plaintiff,

against

UNITED STATES LINES, INC.,

Defendant.

JUDGMENT

The above case having come on for a trial before The Honorable Michael J. Dontzin and a jury in IAS Part 28 on July 24, 25, 26, 30, August 2, 6, 7 and 8, 1990, and the jury having returned its verdict by answers to special interrogatories on August 8, 1990 finding in favor of the plaintiff, and fixing damages as follows:

For loss of services:
Past: $14,000; Future (17 years): $42,500
For loss of support for widow and children:
Past: $70,000; Future (17 years): $276,000

For loss of nurture and guidance for defendant's children:
Erika: Past: $140,000; Future (6 years) $120,000
Alex: Past: $140,000; Future (9 years) $180,000
For conscious physical pain and suffering and mental anguish:
$1,500,000.

And the defendant, by its attorney, William M. Kimball, 233 Broadway, New York NY 10007, having moved pursuant to CPLR § 4404-4406 to set aside the verdict on various grounds including defendant's claim that the proof was insufficient as a matter of law, that the verdict was contrary to the weight of the evidence, and that the award of damages was excessive as a matter of law.

And Thomas A. Stickel, Esq., 11 Park Place, New York, NY 10007, of counsel to Paul C. Matthews, Esq., 107 Washington Street, New York NY 10006, attorney for plaintiff, having appeared in opposition to said motion, and the Court having rendered a decision on June 20, 1991 denying said motion on all grounds, except as to the excessiveness of the jury's award for conscious physical pain and suffering and mental anguish, and the Court having conditionally set that portion of the verdict aside and ordered a new trial solely on that issue, unless plaintiff stipulate to reduce the award for conscious physical pain and suffering and mental anguish to $900,000.

And the plaintiff having stipulated to accept the award as thus reduced, and the plaintiff having moved to have prejudgment interest awarded from the date of death on the discounted value of the various items of demand as of the date of death, and said motion having come on to be heard before The Honorable Michael Dontzin on the ___ day of _____, 1991, and the Court having denied said motion,

And the plaintiff having reduced the various items of future damage to present value as of August 8, 1990, at the stipulated rate of 2% per annum as follows:

Future loss of services for 17 years: $29,500
Future loss of support for widow and children: 191,500
Future loss of nurture and guidance for Erika: 106,300
Future loss of nurture and guidance for Alex: 150,000

it is hereby

ADJUDGED that the Public Administrator of the County of New York, as Administrator of the Estate of Alfredo Valverde, deceased, 31 Chambers Street, New York NY 10007, recover of defendant United States Lines, Inc., 27 Commerce Drive, Cranford, New Jersey, the sum of $1,641,500, said sum representing the jury's award, as reduced by plaintiff's stipulation, and as further reduced to present value by applying a discount rate of 2% per annum to all damages in the future, together with interest from August 8, 1990, to date in the amount of $258,125.87 together with costs and disbursements as taxed in the sum of $1,070.00 making a total sum of $1,900,695.87 and that the plaintiff have execution therefor.

Dated:

/s/ MICHAEL J. DONTZIN
Michael J. Dontzin
Justice of the Supreme Court

/s/ Norman Goodman
Clerk

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 28

Index No.: 17312/85

PUBLIC ADMINISTRATOR, etc.,
Estate of ALFREDO VALVERDE, dec'd,

Plaintiff,

—against—

UNITED STATES LINES, INC.,

Defendant.

DONTZIN, *J.*:

This is a Jones Act/General Maritime Law case (negligence and unseaworthiness) brought for conscious physical pain and suffering and the wrongful death of Alfredo Valverde, who was swept overboard on November 30, 1983, while serving as an ordinary seaman on a large container ship, The American Trader, which was enroute from Oakland, California to Hawaii.

The jury, in response to interrogatories to be more specifically discussed later, found that the United States Lines, Inc., the shipowner, was liable on both of the plaintiff's claims of negligence (Jones Act) and unseaworthiness (General Maritime Law).

At the time of his death, Mr. Valverde was 51 years of age. His widow Maria was 27 years old and his two surviving children, Erica and Alex were 5 and approximately 2 years old respectively.

The jury unanimously awarded damages as follows:

> For loss of services: past—$14,000.00; future (17 years)—$42,500.00.
>
> For the loss of support for the widow and children: past—$70,000.00; future (17 years)—$276,000.00.

For the loss of nurture and guidance for his daughter Erica: past—$140,000.00; future (to run until she reaches 18 years of age)—$120,000.00.

For the loss of nurture and guidance for his son Alex: past—$140,000.00; future (to run until he reaches 18 years of age)—$180,000.00.

With one dissenter, the jury awarded $1,500,000 for conscious physical pain and suffering and mental anguish.

The defendant moved pursuant to CPLR § 4404-4406 to set aside the verdict on various grounds. Those having to do with rulings made during the course of the trial and during the charging conference or after the jury was charged need not be dealt with here. The record sufficiently states the basis of the court's rulings in these matters. The only issues that will be considered here are the defendant's claim that the proof was insufficient as a matter of law, or contrary to the weight of evidence, to sustain the verdict, and that the award of damages was excessive as a matter of law.

A brief discussion of the facts, as demonstrated by the evidence, is appropriate at this time. The American Trader left the port of Oakland on the afternoon of November 29, 1983 with its foredeck ventilators unsecured. The ventilators were so designed that seawater entering them could cause damage to the electrical equipment essential for the ship's operations. The ship encountered heavy seas and high swells after leaving port, especially between midnight (November 29th) and the early morning of November 30th. At approximately 1100 hours, the ship's Master, Captain Roy Fiddler, ordered Chiefmate Rose to take some men to secure three ventilators located on the foredeck (port, starboard and midships). Chiefmate Rose, Bosun Chung, Able-bodied Seaman Bellow and Valverde were on this work crew. During this operation, the wind and seas were coming over the starboard bow, and the ship was pitching violently. The ship was proceeding at maximum speed in accordance with orders that the Captain

had received from the shipowner, and the course of the vessel was not altered to protect the crew from the effects of the wind and heavy seas. Lookouts were not posted on the bridge wings which were 30 feet above the foredeck in order to watch for oncoming waves or swells. Visibility at the time was approximately 10 miles. At approximately 1130 hours the ship plunged down into a trough of a large swell. At that time or a very short time thereafter, a large wave apparently came aboard with such force and effect as to smash Chiefmate Rose, Bosun Chang and Able-bodied Seaman Bellow against equipment and structures on the foredeck causing their instant deaths. Rose, Chang and Bellow were found on the foredeck at approximately 1141 hours. Valverde was never found. After the incident the ship reduced to manuevering speed and some 17 minutes thereafter, after travelling some 4 miles, reversed course and commenced an unsuccessful search for Valverde which lasted for approximately 3½ hours. Thereafter the ship proceeded at maximum speed to Honolulu.

The primary defense in this case was that the accident was caused by a "rouge" or "freak wave." The defendant also contended that there was insufficient proof as a matter of law to demonstrate that there was negligence in failing to post lookouts to watch for oncoming waves, or that there was negligence in the manner in which the ship was handled during the securing of the ventilators, or that there was failure to timely and effectively search for Valverde or that the ship was unseaworthy. Moreover, the defendant contended that there was insufficient proof as a matter of law to demonstrate that Valverde was alive when he was apparently swept overboard or that he suffered any conscious physical pain prior to his death.

The jury, in response to interrogatories specifically found:

> By a 5 to 1 vote that the accident was not caused by a "rouge" or "freak" wave;
>
> The jury unanimously found that there was Jones Act negligence, which caused Valverde's injuries and death;

The jury unanimously specifically found that given the wind and sea conditions that prevailed at the time and the reaction of the ship to those conditions, that the Captain and other ship officers were negligent in ordering the crew to the bow to secure the ventilators; in failing to reduce the ship's speed and turn the ship out of the wind while the ventilators were being secured; in failing to post lookouts in the bridge wings to timely warn the men working on the ventilators on the bow of approaching waves and seas;

The jury unanimously found that the ship was unseaworthy for putting to sea without first securing the bow ventilators or failing to post lookouts on the bridge wings for the purposes discussed;

The jury unanimously found that the unseaworthy condition of the ship was the proximate cause of Valverde's injuries and death;

By a 5 to 1 vote the jury found that Valverde was alive and conscious when swept overboard;

The jury unanimously found that Captain Fiddler failed to engage the ship in a search operation for Valverde within a reasonable period of time after discovering that he was swept overboard; and by a 5 to 1 vote found that this failure was a proximate cause of Valverde's pain and suffering;

By a 5 to 1 vote the jury found that given the conditions that prevailed at the time and the gear that Valverde was wearing when swept overboard, he survived for a period of three hours before expiring.

While the jury may have concluded from the evidence that the accident was caused by a "freak" or "rouge" wave, they rejected that hypothesis for an equally plausible conclusion that it was the failure to operate the ship in a reasonably safe manner (i.e., reduce speed and turn the ship out of the wind

and waves while the work was going on) that caused the accident. *See Rogers v. Missouri Pacific R.R.*, 352 U.S. 500 (1957); *Lavender v. Kurn*, 327 U.S. 645, 653 (1946); *Barboza v. Texaco*, 434 F.2d 121 (1st Cir. 1970).

The evidence in this case rationally supports the jury's specific findings on negligence. This is demonstrable, taking into consideration the sea and wind conditions that existed, and the washing of large waves over the starboard bow, coupled with the failure to alter the ship's course and speed, so as to protect the men working on the bow by having the wind and the sea come into the stern instead of the bow. In this connection, it is important to note that Assistant Chief Engineer Hartig testified that he cancelled all planned work on the bow that morning because of the unsafe wind and sea conditions. Moreover, there was evidence that the ship was under definite orders to proceed at maximum speed and Captain Fiddler continuously ordered the engineering department to make maximum revolutions in order to comply with the U.S. Lines' directive that he proceed at maximum speed to Honolulu. There was testimony that the container shipping industry was highly competitive at that time and it was essential that ships meet very tight schedules in order to be competitive.

Evidence that a large wave, even perhaps a "rouge" wave could have been seen from a distance of approximately 10 miles, which was essentially admitted by Captain Fiddler in his deposition, supports the jury's finding that it was negligent not to post lookouts on the bridge wings to warn the crew working to secure the ventilators of approaching danger.

The evidence of the prevailing weather and sea conditions in November in the Pacific on the Oakland to Honolulu run, as well as available forecasts at the time of the sea and weather conditions, supports the jury's finding that the ship was unseaworthy because the ventilators were not secured before leaving the port at Oakland. The finding that the ship was unseaworthy because of the failure to post lookouts in the bridge wings is supported by the evidence heretofore discussed on that issue.

The testimony of Major Wayne Williams, a survival and rescue-at-sea specialist and expert, with impressive credentials in this field, supports the jury's findings that Valverde was alive and conscious when swept overboard, as well as the jury's finding, with one dissenter, that Valverde survived for a period of three hours before dying. Major Williams explained in his testimony, that much of the energy of the large wave or swells which came aboard over the starboard bow at the time of this incident, was dissipated by the equipment and machinery on deck before it engulfed and lifted Valverde over the port rail into the sea. He further testified that taking into consideration that Valverde received survival training, was in good health and a strong swimmer and was wearing foul weather gear which would protect him from the cold and would help him stay afloat, that Valverde would have had an excellent chance of surviving from three to six hours. Major Williams recounted numerous documented situations, comparable to that which existed here, in which individuals survived for equal or longer periods of time.

On the issue of the search, Major Williams testified that good and accepted search practice, at the time, required that Captain Fiddler or other ship officers to immediately order that buoys or other floatation devices be thrown overboard to mark the place where Valverde went into the sea, and that the ship be slowed immediately and come about, in order to keep the place where Valverde went overboard visible. None of these actions were taken. Moreover, Major Williams testified that the chances of rescue were lost because in addition to failing to take the measures just explained, the ship steamed ahead for more than seventeen minutes then turned on a reciprocal course for $1^1/_2$ hours and did not return to the scene where Valverde went overboard for approximately three hours.

As demonstrated by its verdict, the jury accepted the expert testimony of Major Williams. Considering that it is well established law that a ship has a clear and specific obligation to make every reasonable effort to save the life of a seaman who

falls overboard and that this is the universal custom of the sea; and that this obligation of rescue is in essence a contractual right that goes with a seaman's employment—then under the facts here, one can only fairly conclude that there was a rational basis for the jury's unanimous finding that Captain Fiddler failed to embark upon or engage in a timely and effective search for Valverde. *See Cortes v. Baltimore Insular Line*, 287 U.S. 367 (1932); *Gardner v. National Bulk Carriers*, 310 F.2d 284, 286 (4th Cir.1962); *Johnson v. United States*, 74 F.2d 703 (2nd Cir. 1935).

On the issue of causation, courts have refused to place the burden of proof on the widow of a deceased seaman in search and rescue cases such as this. Instead, once negligence is established, there is a rebuttable presumption of causation in favor of the seaman's representative *Reyes v. Vantage SS Co., Inc.*, 609 F.2d 140, 144-145 (5th Cir. 1980), *Gardner v. National Bulk Carriers, Inc., supra*. The evidence here, especially the testimony of Major Williams, formed a rational basis for the jury's specific finding, with one dissenter, that the failure to engage in a timely and reasonably effective search for Valverde, was a contributing factor to his physical pain and suffering, mental anguish and death.

DAMAGES

The evidence here supports the jury's award for loss of services and support (past and future) for his widow and children. The widow testified as to the chores and services Valverde performed at home when he was not sailing. Her unrebutted testimony as to the sums of money he brought home to her (approximately $9,000 to $12,000 per year) was found credible, since Valverde earned approximately $15,000 per year, and all of his personal living expenses were paid for by his employer (United States Lines) when he was at sea. Moreover, there was testimony by a fellow seaman, a Mr. Da-Silva, that had Mr. Valverde been alive he could have continued to work at a higher annual wage because of the

shortage of seamen willing to go to sea at the time. This testimony, as well as the other evidence (income tax returns), forms a rational basis for the jury's award for support for the widow and the children.

Similarly, the testimony of Mrs. Valverde and Mr. DaSilva as to the care and nurture afforded to the children when Valverde was ashore reasonably supports the jury's unanimous award for this item of damages.

The issue of the damages awarded for conscious physical pain and suffering and mental anguish is not as easily resolved as the damages awarded for loss of services, support, etc.. Courts are and should be reluctant to interfere in situations such as this, where the decedent survived for a period of some three hours before drowning. *See DeLong v. County of Erie*, 60 N.Y.2d 296 (1983). However, the award of $1.5 million here is not reasonable or rational, but on the contrary, is excessive. It would be an abuse of discretion to allow it to stand. While some may argue that an award of one half a million dollars an hour for physical pain and suffering and mental anguish is acceptable here, my judicial conscience compels me to disagree; notwithstanding the spectre of Mr. Valverde lying out there in heavy seas, watching his ship and shipmates disappear in the distance, never to return. It is my view that a rational and appropriate award here would be $900,000, as suggested by defendant's counsel in his brief, citing *Brown v. United States*, 615 F.Supp. 391, 400 (D. Mass. 1985), *app. dismissed*, 795 F.2d 76 (1st Cir. 1986), *cert. den.*, 479 U.S. 1058 (1987).

Counsel have stipulated that in reducing the damages to present value as of the date of the injury, the discount rate should be and is 2% and the prejudgment interest be set at 10%.

Accordingly, the motion is denied in all respects, except as to the issue of the jury's excessive award for conscious physical pain and suffering and mental anguish. That branch of the motion is granted. The award is set aside and a new trial is ordered solely on that issue, unless within 20 days after the

entry of an order and judgment here, plaintiff stipulates to reduce the award for conscious physical pain and suffering and mental anguish to $900,000.

This constitutes the decision of the court.

Settle Order and Judgment.

Dated: June 20th, 1991

/s/ MICHAEL J. DONTZIN

Michael J. Dontzin

J.S.C.

APPENDIX F

Excerpts from the Trial Transcript

M. Valverde-by Plaintiff-Direct

Q. Mrs. Valverde, when your husband was home in Brazil, when he was there, would you tell the jury the types of things that he did around the house, if anything?

A. He helped me around the house, he helped me to take care of the children. He worked in the garden, he worked with the electricity, he did everything that needed to be done around the house.

Q. Did you rent that house or did you own that house?

A. It was rented.

Q. The work that he did around the house, did that in any way effect the amount of rent that you had to pay?

A. The rent was almost halved.

* * *

Q. In the early 1980 timeframe, while your husband was still alive, do you have any recollection as to approximately how much the rent was in local Brazilian currency?

* * *

A. It's very difficult because it changes all the time, every day.

THE COURT: What is the local currency, what is the local currency?

THE WITNESS: Cruzado.

Q. Is that what it was in 1982 or '83, do you know?

A. It was. In 1982, it changed to Cruzado, and now it's Cruzeiro again.

THE COURT: Can you try to search your recollection and tell us to the best of your recollection the approximate monthly rent that she paid in the local currency,

whatever it was at the time, in '80, '81,'82, '83, in that time period.

A. 20,000 Cruzados.

APPENDIX G

Excerpt from Defendant's Proposed Requests to Charge

36. The amount of lost services should be ascertained by determining the nature, duration, and cost if paid for of the household services which Mr. Valverde would have performed if he had survived the casualty. *Complaint of Conn. Nat. Bank*, 733 F. Supp. 14; *Maritime Law Deskbook* (Davis 1989), pp. 123-129.

APPENDIX H

Excerpt from Defendant's Exceptions to the Court's Charge to the Jury

MR. KIMBALL: * * * And I conclude by endeavoring to protect the record, and taking exceptions to your refusal yesterday to charge the substantial substance of request numbers 6, 7, 10, 15, 23, 27, and 36 in Court Exhibit Number 2.

APPENDIX I

Excerpts from the Special Verdict

3. DO YOU FIND THAT THE PLAINTIFF HAS ESTABLISHED BY A FAIR PREPONDERANCE OF THE CREDIBLE EVIDENCE THAT THE SHIP (THE AMERICAN TRADER), ITS APPURTENANCES OR CREW WAS UNSEAWORTHY?

YES X NO _____

BY WHAT VOTE? 6-0

3A. WAS THE SHIP (THE AMERICAN TRADER) UNSEAWORTHY WHEN IT PUT TO SEA WITHOUT HAVING ITS VENTILATORS SECURED (COVERED) WHILE IN PORT IN OAKLAND OR SHORTLY AFTER LEAVING OAKLAND AND BEFORE IT CAME INTO THE OPEN SEA?

YES X NO _____

BY WHAT VOTE? 6-0

3B. WAS THE SHIP (THE AMERICAN TRADER) UNSEAWORTHY BECAUSE OF THE FAILURE TO POST LOOKOUTS ON THE BRIDGE WINGS TO TIMELY WARN THE CREW MEMBERS WORKING ON THE BOW OF THE APPROACH OF DANGEROUS WAVES OR A DANGEROUS SEA?

YES X NO _____

BY WHAT VOTE 6-0

4. WAS THE UNSEAWORTHY CONDITION OF THE SHIP (THE AMERICAN TRADER) ITS APPURTENANCES OR CREW A PROXIMATE CAUSE OF MR. VALVERDE'S INJURIES AND DEATH?

YES X NO _____

BY WHAT VOTE? 6-0

6. DID CAPTAIN FIDDLER EMBARK UPON OR ENGAGE IN A REASONABLY TIMELY AND EFFECTIVE SEARCH MISSION FOR MR. VALVERDE BEFORE HEADING FOR HAWAII?

YES _____ NO __X__

BY WHAT VOTE? __6-0__

7. WAS THE FAILURE OF CAPTAIN FIDDLER TO ENGAGE IN A REASONABLY TIMELY AND EFFECTIVE SEARCH FOR MR. VALVERDE A CONTRIBUTING FACTOR TO MR. VALVERDE'S PAIN AND SUFFERING?

YES __X__ NO _____

BY WHAT VOTE? __5-1__

IF VOTE IS NOT UNANIMOUS—JUROR MEMBER __3__ DISSENTING.

8. FOR WHAT PERIOD OF TIME DID MR. VALVERDE SURVIVE IN THE WATER IN A CONSCIOUS STATE BEFORE HE EXPIRED?

_____3 hrs. approximately_____

BY WHAT VOTE? __5-1__

IF VOTE IS NOT UNANIMOUS—JUROR MEMBER __3__ DISSENTING.

APPENDIX J

Excerpt from Memorandum in Support of Defendant's Post-Trial Motions

Lost Services

The widow testified that during 1979-1983 decedent was at home 2-3 months or more, 2-3 times a year, and performed numerous household services which halved the monthly 20,000 cruzados rent to 10,000 cruzados. While that evidence might have supported a reasonable estimate of the U. S. $ value of decedent's past services and a reasonable inference as to the U. S. $ value of his future services if there were necessary evidence of monthly conversion rates of cruzados to U. S. $, there was no such evidence. Indeed, the widow testified that since 1980 Brazilian currency has been changed and, by reasonable inference, devalued 3 times, and it is commonly known and judicially noticeable that past and prospective economic conditions in Brazil are poor, particularly for ordinary Brazilians, and the fluctuating cruzado/cruzeiro rates for U. S. $ have greatly increased and their U. S. $ values correspondingly greatly decreased.

The Court refused to charge the substance of defendant's request 36, to which defendant duly excepted, that the amount of any lost services should be determined by the nature, duration, and cost if paid for of the household services which decedent would have performed had he survived. The request was supported by citation to *Complaint of Conn. Nat. Bank*, 733 F. Supp. 14 (S.D.N.Y. 1990), where Judge Carter meticulously computed an amount for lost services in precisely that manner, 733 F. Supp., pp. 17-18. In accord are Judge Weinfeld's oft-cited decision *In re Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 15, 28 (S.D.N.Y. 1965), *mod. other grounds*, 364 F. 2d 118 (2d Cir. 1966), *cert. den.*, 385 U.S. 1005 (1967), and the dispositive Fifth Circuit decision *Verdin v. C & B Boat Co., Inc.*, 860 F. 2d 150, 157-158 (5th Cir. 1988).

Thus, if defendant were liable, plaintiff could recover "the *monetary value* of services the decedent provided and would have continued to provide but for his wrongful death." *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 585 (1974) [emphasis added]. Although plaintiff may arguably have proven that "monetary value" in cruzados, the U. S. $ "monetary value" definitely was not proven, and verdict findings 9 and 10, being insufficiently supported, are also speculative, conjectural, and illegal and therefore must be set aside.

Although the widow testified that after Alexander was born in January 1982, decedent made plans to bring his family to live in the United States, the if, when, where, economic consequences of that unexecuted plan compound the speculative infirmity of findings 9 and 10.

Additionally, finding 9 of $14,000 past lost services for 6-$^2/_3$ years averaging $2,102 a year and finding 10 of $42,500 future lost services for 17 years averaging $2,500 a year surpass well publicized annual per capita Brazilian incomes, and are excessive.

APPENDIX K

Excerpts from Plaintiff's Post-Trial Memorandum

The award for loss of services in the past was $14,000. Discounting this to November 30, 1983 gives a present value of $13,200, using the stipulated discount rate of 2%.

The award for loss of services in the future was $42,500 for 17 years. Discounting this to November 30, 1983 gives a present value of $29,300.

The award for loss of support for the widow and children in the past was $70,000. Discounting this to November 30, 1983 gives a present value of $66,000.

The award for loss of support for the widow and children in the future was $276,000 for a period of 17 years. Discounting this to November 30, 1983 gives a present value of $146,500.

The award for loss of nurture and guidance to Alfredo's daughter, Erika, in the past was $140,000. Discounting this to November 30, 1983 gives a present value of $132,000.

The award for future nurture and guidance to Erika for a period of six years was $120,000. Discounting this to November 30, 1983 gives a present value of $97,500.

The award for loss of nurture and guidance to Alfredo's son, Alex, in the past was $140,000. Discounting this to November 30, 1983 gives a present value of $132,000.

The award for future nurture and guidance to Alex for a period of nine years was $180,000. Discounting this to November 30, 1983 gives a present value of $125,000.

* * *

In the proposed judgment, interest has been calculated up to July 15, 1991 at the rate of 10%, compounded annually, in the aggregate amount of $1,757,250, based on the total present value as of November 30, 1983 of $1,641,500.

APPENDIX L

Excerpts from Letter dated July 16, 1991 from Defendant's attorney to the trial judge

On August 7, 1990, trial counsel stipulated that if any damages which the jury might award should be discounted to present value, you would compute the reductions at the 2% rate suggested in *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F. 2d 30, 39-40 (2d Cir. 1980), *cert. den.*, 451 U.S. 971 (1981), and that if there should be prejudgment interest on any damages which the jury might award, you would compute the interest at the rate of 10% per annum.

As observed in the first paragraph of your June 20, 1991 decision, plaintiff sought damages for negligence under the Jones Act and unseaworthiness under general maritime law. The verdict finds both negligence and unseaworthiness, but does not allocate the damages for lost services, support, and nurture to either negligence or unseaworthiness. The damages for pain, suffering, and anguish are solely for Jones Act negligence.

Prejudgment interest cannot lawfully be allowed on any damages for Jones Act negligence. *Haggerty v. Moran Towing & Transp. Co.*, 556 N.Y.S.2d 314, 315 (1st Dept. 1990).

Even if prejudgment interest could properly be allowed on a civil verdict of damages for unseaworthiness, plaintiff in this case "is not entitled to prejudgment interest because the jury awarded damages on the Jones Act and unseaworthiness claims without allocating its award between the claims", *McPhillamy v. Brown & Root, Inc.*, 810 F. 2d 529, 531 (5th Cir. 1987), plaintiff's attorney not having requested any allocation. *Ibid.*, p. 532.

Thus, no prejudgment interest can lawfully be allowed in any judgment entered in this case.